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No. 12

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938

D. F. STAHMANN, ANNA M. STAHMANN, and JOYCE F. STAHMANN, doing business as Stahmann Farms Company,

Petitioners,

VERSUS

S. P. VIDAL, Collector of Internal Revenue of the District of New Mexico,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' BRIEF

THORNTON HARDIE,
Of El Paso, Texas,
Attorney for Petitioners.

W. C. WHATLEY,
Of Las Cruces, New Mexico,

R. NEILL WALSHE,
Of El Paso, Texas,
Of Counsel.

ROBERT H. JACKSON,
Solicitor General of the United States,
Washington, D. C.

F. E. YOUNGMAN,
Special Assistant to the Attorney General,
Washington, D. C.
Attorneys for Respondent.

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I.

OPINIONS BELOW

The Findings and conclusions and Judgment of the District Court of the United States for the District of New Mexico (Colin Neblett, Judge) appear on pages 14

to 16 of the Record. The opinion of the Circuit Court of Appeals for the Tenth Circuit (Symes, District Judge) is reported in 93 F. (2d) 902; and appears on pages 31 to 35 of the Record.

II.

Writ of Certiorari was granted by this Court on April 25, 1938 (R. 32), 58 Sup. Ct. Rep. 943, ____ U. S. ____.

In granting the Writ, the Court made the following notation:

> "The petition for writ of certiorari is granted limited to the question of whether the petitioners were the proper parties to maintain the suit."

III.

STATEMENT OF THE CASE

A. FACTS INVOLVED

1. Pleadings

(a) Plaintiff's Original Petition, filed May 5, 1936 (R. 1-3)

1. Plaintiffs, during the crop year 1934-1935, were engaged in the growing of cotton in Dona Ana County, New Mexico, cultivating a plantation having an acreage of more than 2000 acres, and which they had been cultivating for many years.

2. During the year 1934, they produced a quantity of cotton in excess of the quota permitted them under the Bankhead Cotton Control Act, and in order to sell or to market the cotton which they had raised in excess of said quota, they were compelled to obtain bale tags

for said cotton, for which they were compelled to pay, under protest, the sum of $13,064.52, payment being made by Plaintiffs by their checks payable to the order of S. P. Vidal, Collector of Internal Revenue of the United States for the District of New Mexico, who collected the amounts specified in said checks. The tax was exacted from Plaintiffs by the Defendant pursuant to the provisions of the Bankhead Act. The assessment and collection of said tax by the Defendant was illegal and wrongful, in that said Act was void and unconstitutional, and the Act furnished no authority to the Defendant to demand, exact, receive and retain said tax.

3. On March 6, 1935, Plaintiffs duly filed with the Defendant claim for refund in accordance with the provisions of law and the regulations of the Secretary of the Interior, and said claim was forwarded to the Commissioner of Internal Revenue and was by him denied and rejected, and due notice thereof given to the Plaintiffs, and Plaintiffs pray Judgment for the recovery of said tax, with interest.

The pleading was verified by D. F. Stahmann, one of the Plaintiffs.

(b) Defendant's Amended Answer, filed October 15, 1936 (R. 5-6)

1. Defendant admits the allegations of the first paragraph of Plaintiffs' Complaint.

2. Defendant admits that during the crop year 1934-1935 Plaintiffs produced a quantity of cotton in excess of the quota allowed them under the Bankhead Act, and that the sum of $13,064.52 was paid to Defendant on the dates and in the amounts alleged in Paragraph 2 of the

Complaint. Defendant says that he denies that the amounts were paid by the Plaintiffs under protest or otherwise, and alleges that if such amounts were paid to him by the Plaintiffs they were paid to discharge the liability imposed upon a person or persons other than the Plaintiffs by the Act of April 21, 1934. Defendant denies that the Plaintiffs were compelled to pay such amounts to him, and that he illegally assessed or collected any sums from the Plaintiffs, or from any person whose liability under the Act of April 21, 1934, was discharged by the Plaintiffs.

3. The Defendant admits that on March 6, 1935, Plaintiff duly filed a claim on the forms provided by the Treasury Department for the refund of said sum of $13,064.52; that the Commissioner of Internal Revenue rejected said claim on August 22, 1935. The allegations not admitted were denied.

The answer was verified by the Defendant.

2. Evidence

(R. 7-11)

The following facts were established by admissions and stipulations. The facts admitted by the Defendant's answer were agreed to. It was further agreed that the facts upon which the Court might pass as pertinent to the issues in this case were as follows:

1. During the crop year 1934-1935, Plaintiffs produced a quantity of cotton in excess of the quota allowed them under the Bankhead Act.

2. Plaintiffs delivered their cotton to the Santo Tomas

Gin Company, of Mesquite, New Mexico, for the purpose of being ginned.

3. Said Company ginned Plaintiffs' cotton, and thereafter filed monthly returns with the Collector of Internal Revenue for New Mexico for the months of October, November and December, showing a total tax due in the amount of $13,064.52.

4. Upon the returns referred to, assessments were made against the Santo Tomas Gin Company, as follows:

"Cotton ginning:

Oct.-Nov. 1934 P.T. 1934 Dec. P. 8000 L. 7 $11,193.99
12/19/34 11,193.99 PD.

Dec. 1934 P.T. 1935 Jan. P. 8001 L. 0 $ 1,870.53
1/25/35 1,870.53 PD."

The above tax was paid by checks drawn by Stahmann Farms, payable to the Collector of Internal Revenue, as follows:

Check No. 1571 for $9131.44, dated November 27, 1934, drawn on the State National Bank, of El Paso, Texas, cleared through Clearing House, El Paso Branch, Federal Reserve Bank, December 21, 1934;

Check No. 1584, for $1550.23, dated November 28, 1934, drawn on the State National Bank of El Paso, Texas, cleared through Clearing House, El Paso Branch, Federal Reserve Bank, December 21, 1934;

Check No. 1728, for $512.32, dated December 13, 1934, drawn on the State National Bank of El Paso, Texas,

cleared through Clearing House, El Paso Branch, Federal Reserve Bank, December 21, 1934; and

Check No. 135, dated January 19, 1935, for $1870.53, drawn on the State National Bank of El Paso, Texas, cleared through Clearing House, El Paso Branch, Federal Reserve Bank, January 26, 1935.

5. Santo Tomas Gin Company declined to deliver the ginned cotton to Plaintiffs until the above assessments were paid and Plaintiffs paid the said tax by checks drawn by Stahmann Farms payable to the Collector of Internal Revenue in the amounts hereinbefore listed.

6. The Collector of Internal Revenue applied said payments against the assessments which appeared on his books under the name of Santo Tomas Gin Company, Mesquite, New Mexico.

7. On March 6, 1935, Plaintiff filed a claim for refund for $13,064.52, based upon the alleged unconstitutionality of the Bankhead Act.

8. The Commissioner of Internal Revenue rejected the claim on August 22, 1935.

The original stipulation purported to state the issues of law (R. 9), but this stipulation was withdrawn (R. 10).

B. QUESTION PRESENTED

When the producer of cotton has been required to pay the Bankhead tax to the Collector of Internal Revenue of the United States for the District of New Mexico in order to obtain any beneficial use of his cotton, can he thereafter recover from the Collector the concededly illegal tax?

C. STATUTES INVOLVED

Act of April 21, 1934, c. 157, 48 Stat. 598, 7 U. S. C. A., Section 701, et seq., generally known as the Bankhead Cotton Control Act. The Court is familiar with the general terms and purpose of the Act. The particular provisions of the Act applicable to the question involved here are set forth below.

(Sec. 3) (a) When the Secretary of Agriculture finds for the crop year 1935-1936 . . . if the provisions of this Act are effective for such crop year, that two-thirds of the persons who have the legal or equitable right as owner, tenant, sharecropper or otherwise, to produce cotton on any cotton farm or part thereof in the United States for such crop year favor a levy of a tax on the ginning of cotton in excess of an allotment made to meet the probable market requirements and determines that such a tax is required to carry out the policy declared in Section 1, the Secretary shall ascertain from an investigation of the available supply of cotton and the probable market requirements the quantity of cotton that should be allotted, in accordance with the policy declared in Section 1, for marketing in the channels of interstate and foreign commerce, from production of cotton during the succeeding cotton crop year, exempt from the payment of taxes thereon.

(Sec. 3) (c) For the crop year 1934-1935 ten million bales is hereby fixed as a maximum amount of cotton of the crop harvested in the crop year 1934-1935, that may be marketed exempt from payment of the tax herein levied . . .

(Sec. 4 (a) There is hereby levied and assessed on

the ginning of cotton hereafter harvested during the crop year with respect to which this Act is in effect, a tax at the rate per pound of the lint cotton produced from ginning, of 50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound . . .

(Sec. 4) (c) Every person ginning any cotton subject to tax under this Act (whether as agent of the owner or otherwise) and every other person liable for tax under this Act shall make monthly returns under oath in duplicate and pay the taxes imposed by this Act to the Collector for the District in which the ginning is done, or to such other person as such Collector may direct . . . The tax shall, without assessment by the Commissioner or notice from the Collector, be due and payable to the Collector at the time so fixed for filing the return.

(Sec. 4) (e) No tax shall be imposed under this Act with respect to—

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

(3) Cotton harvested prior to the crop year 1934-1935.

(Sec. 4) (f) The tax shall not be collected upon the ginning of cotton which is to be stored by the producer thereof either on the farm or at such place as may be permitted by regulations prescribed by the Secretary of Agriculture and the Secretary of the Treasury. In such cases, the payment of the tax shall be postponed, but shall be paid at the time when bale tags are secured for

such cotton. Bale tags may be secured for any of such cotton at any time after ginning, (1) upon the payment to such person as the Commissioner may direct, of the amount of tax which would have been payable at the time of ginning, or (2) upon the surrender of certificates of exemption covering an amount of cotton not less than the amount of such cotton. Until bale tags are secured for such cotton, such cotton shall be subject to a lien in favor of the United States for the amount of the tax payable with respect to the ginning of such cotton. The right to postponement of the payment of the tax under this sub-section shall be established in accordance with such regulations as the Secretary of Agriculture and the Secretary of the Treasury may prescribe. The Commissioner, with the approval of the Secretary of the Treasury, shall prescribe regulations providing for stamping the containers of such cotton so as to indicate the time of ginning and the amount of tax payable with respect thereto.

(Sec. 4) (g) The right to exemption under Paragraph (2) of sub-section (e) shall be evidenced by a certificate of exemption issued as herein provided, which certificate of exemption shall be conclusive proof of the right to such exemption.

(Sec. 5) (a) When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary of Agriculture shall apportion to the several cotton producing states the number of bales the marketing of which may be exmpt from the tax herein levied . . .

(Sec. 5) (b) The amount allotted to each state (less the amounts allotted under Section 8) shall be apportioned by the Secretary of Agriculture to the several counties in such State on a basis and ratio, applied to such counties, similar to that set forth in sub-section (a), except that . . .

(Sec. 6) A producer of cotton desiring to secure a tax exemption certificate may file an application therefor with the agent designated by the Secretary of Agriculture, accompanied by a statement under oath showing the approximate quantity of cotton produced on the lands presently owned, rented, sharecropped, or controlled by the applicant during a representative period fixed by the Secretary of Agriculture . . . No certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe, to assure the co-operation of such producer in the reduction programs of the Agricultural Adjustment Administration, and to prevent expansion on lands leased by the Government of competitive production by such producer of agricultural commodities other than cotton.

(Sec. 7) (a) The amount of cotton allotted to any county pursuant to section 5 (b) shall be apportioned by the Secretary of Agriculture to farms on which cotton has been grown within such county.

(Sec. 7) (a) (3) . . . The Secretary of Agriculture, in determining the manner of allotment to individual farmers, shall provide that the farmers who have volun-

tarily reduced their cotton acreage shall not be penalized in favor of those farmers who have not done so.

(Sec. 8) Whenever an allotment is made pursuant to section 3, not to exceeed 10 per centum of the number of bales allotted to each state shall be deducted from the number of bales allotted to such state, and allotted in such State—

(a) To producers of cotton on farms where, for the preceding three years less than one-third of the cultivated land on such farms has been planted to cotton;

(b) To producers of cotton on farms not previously used in cotton production;

(c) To producers of cotton on farms where, for the preceding five years, the normal cotton production has been reduced by reason of drought, storm, flood, insect pests, or other uncontrollable natural cause; and

(d) To producers of cotton on farms where, for the preceding three years, acreage theretofore planted to cotton has been voluntarily reduced so that the amount of reduction in cotton production on such farm is greater than the amount which the Secretary finds would have been an equitable reduction applicable to such farms in carrying out a reasonable reduction program. The allotments provided for in this section shall be in addition to the amounts apportioned to the counties under section 5 (b).

(Sec. 10) (a) Upon the payment of the tax on any cotton or the surrender of exemption certificates covering cotton, the collector receiving such payment or certifi-

cates shall deliver to the persons so paying or surrendering an appropriate number of bale tags, which shall be affixed to said cotton.

(Sec. 12) The Commissioner, with the approval of the Secretary of the Tueasury, shall prescribe (a) regulations with respect to the time and manner of applying for, issuing, affixing and destroying bale tags, and the method of accounting for receipts from the sale of and for the use of such bale tags, and (b) such other regulations as he shall deem necessary for the enforcement of the taxing provisions of this Act.

(Sec. 14) (b) Except as may be permitted by regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, with due regard for the protection of the Revenue, no person shall: (1) Transport, except for storing or warehousing, under the provisions of Section 4 (f) (storing or warehousing) beyond the boundaries of the county where produced, any lint cotton to which a bale tag issued under this act is not attached; or (2) sell, purchase, or open any bale of lint cotton to which a bale tag issued under this Act is not attached.

(Sec. 14) (c) No seed cotton harvested during the crop year with respect to which the tax is in effect shall be exported from the United States or any possession thereof to which this Act applies, to any possession of the United States to which this Act does not apply or to any foreign country.

(Sec. 15) (b) The Scretary of Agriculture may make regulations protecting the interests of share-croppers and tenants in the making of allotments and the issuance of tax exemption certificates under this Act.

(Sec. 17) (b) Appropriations for administrative expenses under this Act are authorized to be made available to enable the Secretary of Agriculture to pay any person, who, in connection with the operation of any cotton gin, incurred additional expenses in connection with the administration of this Act with respect to cotton ginned during the crop year 1935-1936, or any subsequent crop year, in which this Act is in effect, and who applies to the Secretary therefor, compensation in the amount of such additional expenses, but not in excess of the rate of 25 cents per bale of such cotton ginned by such person, provided proof satisfactory to the Secretary of Agriculture is furnished that the additional expenses for which such person makes application have not been passed on in any manner whatsoever (Section 40 of the Act of August 24, 1935).

(Sec. 20) (a) No refund of any tax, penalty, or sum of money paid shall be allowed under this Act unless claim therfor is presented within six months after the date of payment of such tax, penalty, or sum.

(Sec. 21) If any provision of this Act, or the application thereof, to any person or circumstance is held invalid, the remainder of this Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

Act of February 10, 1936, 49 Stat. 1106, repealed the Bankhead Act. 28 U. S. C. A., Section 41, subdivision 5; suits against the Collector to recover taxes wrongfully collected may be prosecuted in the Federal Court.

26 U. S. C. A., Sections 1670 to 1675. Statutes regulating claims and refunds on taxes illegally collected.

D. HISTORY OF THE CASE IN AND RULINGS OF THE LOWER COURT

Plaintiffs' Petition sought recovery of $13,064.52 paid by them to the Defendant as taxes under the Bankhead Act on cotton produced by Plaintiffs in 1934. It was alleged that the Act was unconstitutional, and that Plaintiffs have been compelled to pay the tax in order to have any beneficial use of their cotton (R.1-3).

Defendant alleged that the tax was assessed against the ginner, and not against Plaintiffs, who were the producers of the cotton, and that the payment having been voluntarily made could not be recovered (R. 5-6).

Upon the conclusion of the case, District Judge Colin Neblett held that the Bankhead Act was unconstitutional, and rendered Judgment for Plaintiffs for $13,064.52 and interest (R. 16). On appeal, the United States Circuit Court of Appeals for the Tenth Circuit (D. J. Symes) reversed the lower court, and held that the Plaintiffs having voluntarily paid a tax which was not their obligation but that of the ginner, could not recover (R. 26-30).

IV. SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:—

1. In holding that Plaintiffs, who paid the Bankhead tax incident to cotton owned by them, and who had duly filed a claim for refund which had been denied, were volunteers, and not entitled to recover from Defendant the taxes actually paid by them to the Defendant, even though the Bankhead Act is unconstitutional.

V. SUMMARY OF ARGUMENT

It is the contention of Petitioners:—

1. The Bankhead Cotton Control Act is unconstitutional and void. *U. S. v. Lee Moor*, 93 F. (2d) 422, Petition for Writ of Certiorari denied by Supreme Court, April 11, 1938.

2. Since under the provisions of the Bankhead Act and also under the facts of this case, Petitioners could have made no beneficial use of their cotton without payment of the tax, the tax was paid under compulsion and duress, and they are entitled to recover the sums paid by them with interest.

3. Under the provisions of 26 U. S. C. A., Section 1670 (a) (1) and 26 U. S. C. A., Sections 1672-1673, (a) and (b), when a person has paid a tax which is void because the levying Act is unconstitutional, such person may recover the tax paid by him, whether or not he made the payment under compulsion or duress.

VI. ARGUMENT

First Point

Since under the provisions of the Bankhead Act and also under the facts of this case, Petitioners could have made no beneficial use of their cotton without payment of the tax, the tax was paid under compulsion and duress, and they are entitled to recover the sums paid by them with interest.

Second Point

Under the provisions of 26 U. S. C. A., Section 1670 (a) (1) and 26 U. S. C. A., Sections 1672-1673, (a) and (b), when a person has paid a tax which is void because the levying act is unconstitutional, such person may recover the tax paid by him, whether or not he made the payment under compulsion or duress.

It was shown that the bales of cotton with reference to which the taxes were paid by Petitioners were owned by Petitioners, and were of such character that the taxes paid were due by the terms of the Bankhead Act. It was also agreed that the Santo Tomas Gin Company, which had ginned the cotton, was in possession of it and refused to deliver the cotton to Petitioners unless they paid the tax of $13,064.52, incident to said cotton. The Cotton Control Act of 1934 (Bankhead Act) is the Act of April 21, 1934, 48 Stat. 598, c. 146, as amended by the Act of August 9, 1935 (Public Resolution 47, 74th Congress, H. J. Res. 258), and by the Act of August 24, 1935 (Pub. No. 320, 74th Congress, H. R. 8492). The repeal followed the decision of the Supreme Court in *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312; Act of February 10, 1936, 49 Stat. 1106.

The provisions of the Bankhead Act which are particularly important for consideration in connection with our First and Second Points are set out on pages 7 to 13 of this Brief.

Those who vote to determine whether the tax shall be levied are the producers, not the ginners. Section 3 (a).

Exemptions from the tax are based upon time, manner and character of production, not upon time, manner or character of ginning. Section 4 (e).

Exemptions from the tax are allowed to producers, not ginners. The producer is the one who must comply with the conditions and limitations imposed by the Secretary of Agriculture in order to obtain the exmption certificates. Section 6.

Quotas for exemptions are allowed to farms and farmers, not to gins or ginners. Section 7.

The lien of the tax is against the property of the producer, not of the ginner. Section 4 (f).

It is the property of the prodncer that cannot be transported beyond the county except for storing, and cannot be sold, purchased or removed from the bale until the tax has been paid. Section 13 (b).

The Secretary of Agriculture is authorized to make regulations protecting the interests of share croppers and tenants in the distribution of exemptions, not the interest of ginners. Section 15.

It is the producer's, not ginner's, past history and conduct that is material in fixing the exemption quota. Sections 5, 7 and 8.

That Congress had no intention that the ginner should be put to an expense in connection with the Act is shown by Section 17 (b), where the ginner is to be reimbursed up to 25c a bale for additional expense incurred by him in connection with the administration of the Act.

If it were merely a tax on ginning, why would the tax not be assessed upon all cotton ginned, wherever and whenever raised, and regardless of the amount raised on a particular farm?

It is common knowledge that the customary charge for ginning a 500 pound bale of lint cotton is approximately $6.00, yet the tax was approximately $30.00 a bale. Clearly, the ginner was not expected to pay the tax out of his ginning charges, or out of his own funds. The ginner was used merely as a convenient collecting agent to enforce the payment of the tax.

No beneficial use can be made of cotton until it is first ginned and baled, and then it cannot be used until the bale is opened. The Act made it impossible for a farmer to sell or make any beneficial use of his cotton until the tax was paid. Moreover, under the stipulations in this case, the ginner would not release the cotton to Petitioners until they personally paid the tax with their own checks, payable directly to the Defendant in this case.

We think the Circuit Court of Appeals was in error in saying:

> "The law applicable to this situation is thus stated in 61 C. J. p. 949, etc., Sec. 1226:
>
> 'Payment of taxes by a stranger, a mere volunteer . . . cannot be made the foundation of any right or claim on the part of such third person.'
>
> "Sec. 1227, p. 950:
>
> 'But a person cannot make the true owner of property his debtor by a mere voluntary payment of taxes thereon'."

Section 20 of the Bankhead Act reads:

"(Sec. 20) (b) No suit or proceeding shall be maintained in any court for the recovery of any tax under this act alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under due protest or duress. No suit or proceeding shall be begun before the expiration of six months from the date of filing such claim, unless the Commissioner renders a decision therein within that time, nor after the expiration of two years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall, within ninety days after any such disallowance, notify the tax payer thereof by registered mail."

26 U. S. C. A., Sections 1672 and 1673, reads:

"(a) *Limitations*—(1) *Claim.* No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the

provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

"(2) *Time.* No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claims unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

"(b) *Protest or Duress.* Such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress."

Judge Symes in his opinion said;

"In the following cases recovery of taxes paid by volunteers under circumstances more or less similar to those of the instant case were denied. Central Aguirre Sugar Co. v. U. S., 2 Fed. Supp. 538, Wourdeck v. Backer, 55 Fed. (2d) 840 (C. C. A. 8th), certiorari denied 286 U. S. 548; Clift and Goodrich v. U. S., 56 Fed. (2d) 751 (C. C. A. 2nd), certiorari denied 287 U. S. 617; Ohio Locomotive Crane Co. v. Denman, 73 Fed. (2d) 408 (C. C. A. 6th), certiorari denied 294 U. S. 712; Hammerstrom, County Treasurer, v. Toy Nat. Bank of Sioux City, 81 Fed. (2d) 628 (C. C. A. 8th)."

Of the cases cited in the opinion by Judge Symes, four were cases where the taxes were admittedly valid and were legally due from someone and were paid willingly by the one who sought to recover. In *Central Aguirre Sugar Co. v. U. S.*, supra, the tax was paid by the one who was ultimately liable for it. In *Wourdeck v. Becker*, supra, the president willingly paid a tax rightfully assessed

against a corporation in which he was interested. In *Clift & Goodrich, Inc. v. U. S.*, supra, the corporation willingly paid a valid tax against the partnership which it succeeded. In *Ohio Locomotive Crane Co. v. Denman*, a corporation willingly paid, with full knowledge of the facts, a tax actually and legally due from another.

All of these cases support our contention. The inference from them is that had the tax been illegal and not actually due from anyone, the person paying the tax would have been allowed to recover. In the language of the last case cited:

> "The amendment (1924) permits the recovery of taxes *illegally assessed or collected, regardless of whether payment was voluntary, or otherwise,* but it gives no aid to one who pays another's tax *actually due* with full knowledge of what he is doing."

The other case of *Hammerstrom v. Toy National Bank*, supra, and the cases there cited, dealt with situations to which the amendment of 1924 and the present laws eliminating the necessity of protest and duress were inapplicable.

Additional cases cited by Judge Symes are *Union Pacific Railroad Company v. Board of Commissioners*, 98 U. S. 541, 543, 25 Law Ed. 196; *Little v. Bowers*, 134 U. S. 547; *U. S. v. New York and Cuba Mail Steamship Co.*, 200 U. S. 488; *Blanks v. Hazen*, 85 F. (2d) 284; *Ward v. Love County*, 253 U. S. 17; *U. S. v. Edmondston*, 181 U. S. 500; *Chesebrough v. U. S.*, 192 U. S. 253.

Union Pacific Railroad Co. v. Board of Commissioners, 98 U. S. 541, 543, 25 Law Ed. 196. The Court said:

> "Before these payments were made there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The Company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way."

The Court said no attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the Company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. This case was decided in *1879*, when it was necessary to pay under protest and duress, but even in that case the rule was recognized that where the payments were made to release goods held for duties a recovery was justified upon the fact that the payment was made to release property from detention.

Little v. Bowers, 134 U. S. 547, 33 Law Ed. 1016. This case was decided in *1890*. It was held that where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, and without an immediate and urgent necessity therefor, and not to release his property or person from detention or to prevent an immediate seizure, such payment is deemed voluntary and cannot be recovered.

U. S. v. New York & Cuba Mail Steamship Co., 200 U. S. 488. In this case documentary stamps had been pur-

chased at various times without protest. Thereafter, the stamps were used by fixing them to manifests of cargoes on vessels bound for foreign ports. The Court said:

> "The destination of the stamps cannot affect the payment of the tax which they represent. It may be more or less of an inducement to submit to the tax, but who can determine the degree? . . . Besides, whatever element of coercion there was came from the United States, and it was not as immediate in the case of the manifests as in the case of the deed."

and again:

> "There was no claim to the collector of the port from whom the clearances were asked that the Defendant-in-Error was acting under the restraint of the law, and yielding only to enable ships to depart to their destinations."

This case was decided in *1906*, prior to the amendment to the Internal Revenue Act in 1924.

Ward v. Love County, 253 U. S. 17, 64 Law Ed. 751. This case was decided in *1920*. Mr. Justice Van Devanter said:

> "Through the pending suits and otherwise, they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But, notwithstanding this, the county demanded that the taxes be paid, and by threatening to sell the lands of these claimants, and actually selling other lands, similarly situated, made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of 18%, they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal.

The moneys thus collected were obtained by coercive means—by compulsion. The county and its officers reasonably could not have regarded it otherwise; much less the Indian claimants . . . . . *The County places some reliance on Lamborn v. Dickinson County, 97 U. S. 181, 24 Law Ed. 926, and Union Pacific Railroad Co. v. Dodge County, 98 U. S. 541, 25 Law Ed. 196; but those cases are quite distinguishable in their facts and some of the general observations therein to which the county invites attention must be taken as modified by the latter cases just cited.*"

(Italics ours).

One of the cases cited in the above case was *A. T. & S. F. Railway Co. v. O'Connor*, 223 U. S. 280, 56 Law Ed. 436. The opinion in that case was by Justice Holmes. In the course of his opinion he said:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy . . . . when, as is common, the State has a more summary remedy such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, *Courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made*, but, even if the State is driven to an action if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms. If he should seek an injunction . . . . he would run the same risk as if he waited to be sued." (Italics ours.)

This was made clear in *Lee Moor v. T. & N. O. Railroad*, 75 F. (2d) 386, where it was held that because of the legal remedy the mandamus there sought could not be had.

U. S. v. Edmondston, 181 U. S. 500, 45 Law Ed, 971. This was a case where a purchaser of public lands had paid $2.50 per acre instead of the statutory price of $1.25 per acre. The mistake was not induced by any misrepresentation of the Government or its officials, and it was held that there was no law by which the purchaser could sue the United States to recover the payment. The case was decided in *1901*, and had nothing to do with taxes.

Chesebrough v. U. S. 192 U. S. 253, 48 Law Ed. 432. This case was decided in *1904*. In that case, the Plaintiff sought to recover a sum expended in the voluntary purchase of revenue stamps from a collector to be affixed to a conveyance. The Court said that the purchase of the stamps was purely voluntary, and that there was no protest or notice at the time the stamps were purchased.

None of the cases cited by Judge Symes go so far as to hold that the facts in our case were not sufficient to show that the payment by Petitioners was made under duress. None of them hold that, since 1924, a person who has paid a tax which in fact was not legally due from any one, could not recover the tax, even though it was paid voluntarily. Surely, in this Court, it is not necessary to list the innumerable cases which have been decided since 1924 where it has been held that taxes which were voluntarily paid, and which were thought to be due from the tax payer at the time he made the payment, can, nevertheless, be recovered when it appears that the taxes

were not in fact legally assessed or *were not in fact due from the particular taxpayer*, or that the law under which they were assessed was invalid.

We shall, however, briefly refer to a number of cases which to some extent bear upon the questions which are here involved.

A Judgment directing a return to Plaintiffs of the money paid by them under a void statute is fully within the spirit of the decisions of this Court in *U. S. v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 54 Sup. Ct. 443, and *Anniston Mfg. Co. v. Davis, Collector*, 301 U. S. 337, 57 Sup. Ct. 816. This Court said in the latter case, with quotations from the former case:

> "But, we were unable to conclude that in imposing this restriction the section struck down prior rights or did more 'than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief'."

301 U. S. 349, 57 Sup. Ct. 822.

Petitioners here are certainly the ones who bore the burden of the illegal tax, and they are therefore entitled in justice and good conscience to judgment for its return.

We think that the case of *White v. Hopkins, Collector of Internal Revnue*, 51 F. (2d) 159, Fifth Circuit, July, 1931, is particularly applicable to our case. Taxes were assessed against the Imperial Gasoline Company, of which P. J. White was a stockholder. A warrant of dis-

traint was issued against the company in care of P. J. White. The Collector made demand upon White for payment of the taxes, and threatened to seize property belonging to White and to file suit against him. In fear of execution of said warrant and the institution of said suit, White made payment of the tax out of his own funds. Later, he made application for a refund of the taxes on the ground that he was not the taxpayer against whom the assessment was made, and that he had paid the tax under duress and threat of distraint. The claim was denied and suit was brought by White for the collection of the tax. The Court held that Appellant's case was governed by Revised Statutes, Section 3226. The Court said:

> "We need not discuss whether the compulsion alleged amounted to duress in law or whether the protest was sufficient, as neither duress nor protest was by this section necessary to be shown. He alleges compliance with the condition precedent of appealing to the Commissioner for a refund. The statute applies to the recovery of any tax 'in any manner wrongfully collected' from anyone, and is broad enough to support the cause of action alleged. There is no doubt from the allegations of the petition that the taxes were wrongfully collected."

The Court also said:

> "However, appellee contends that the Imperial Gasoline Co. was the taxpayer, as defined by the act, and that it neither appealed to the Commissioner nor brought the suit, and that no one but the Imperial Gasoline Company could appeal to the Commissioner or maintain a suit to recover back the taxes alleged in this case to have been illegally collected. *In other words, Appellee assumes the position that having*

collected the tax from one who did not owe it unless it could not have been legally collected from one who did, no right of redress exists. It cannot be assumed that the United States has adopted any such illogical and inequitable attitude towards her citizens unless the enactments of Congress clearly leave no alternative." (Italics ours).

The Court also said:

"The reasonable construction of the section is that the definition of 'tax payer' does not exclude other definitions in general use, and commonly understood. The dictionaries all define 'tax payer' as 'one who pays a tax'. *Undoubtedly, appellant paid the tax which he sought to recover back, and therefore would be a tax-payer under the usual and ordinary definition.* In paying the tax, appellant was not a mere volunteer. A tax imposed upon a corporation is indirectly a tax upon its stockholders. As a stockholder of the Imperial Gasoline Company he had an interest in paying the tax, although slight, to stop the running of the statute of limitations barring a suit to recover it back and to prevent further accumulation of interest. The Collector demanded payment of the tax and enforced collection by threats. Whether these threats could be made effective is immaterial. They were sufficient to operate on the mind of appellant and induce him to make payment against his will. The Commissioner received the money and retained it. He entertained and passed upon the application for a refund, and notified appellant personally of the rejection of his claim without suggesting that he did so because he was not considered the tax payer." (Italics ours)

We think that the spirit in which a case of this character should be considerd is properly described in *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 378, 53 Sup. Ct. 620, 622, opinion by Mr. Justice Cardozo, 1933. The Court said:

> "In this situation, the government was unjustly enriched at the expense of a taxpayer, when it held on to moneys that had been illegally collected, whether with protest or without. So, at least, the lawmakers believed and gave expression to that belief, not only in the statute but in Congressional reports. Separate Report No. 398, 68th Congress, First Session, pp. 44, 45; House Report No. 179, 68th Congress, First Session, pp. 33, 34. The amendment was designed to right an ancient wrong. It did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule. A high-minded government renounced an advantage that was felt to be ignoble and set up a new standard of equity and conscience. There was no thought to discriminate between payments made and those to come. A fine sense of honor had brought the statute into being. We are to read it in a kindred spirit. U. S. v. Emery, 237 U. S. 28, 59 Law Ed. 825."

In the case of *U. S. v. Arnold*, 89 F. (2d) 246 (Third Circuit, February 4, 1937), the Court had for consideration a case in which the Trustees had paid a tax which should have been paid by the beneficiaries. The Trustees had paid a tax for which thy were not legally liable. The tax was in fact due from the beneficiaries. The Court held that the Trustees might recover, even though the claim against the beneficiaries had become barred by

limitations. Here was a case where a party not legally liable for a tax had paid it voluntarily, but nevertheless was permitted to recover.

In *Dorrance v. Phillips, Collector*, 85 F. (2d) 660, 662, (Third Circuit, August 31, 1936), the Court said:

> "The payments were accordingly not voluntary, but even if they had been, under Section 1014 of the Revenue Act of 1924 (43 Stat. 343) in force at the time the payments were credited to the Lackawanna Company, they may be recovered. Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 Sup. Ct. 620; U. S. v. Scott, 69 F. (2d) 728."

In *U. S. v. Scott*, 69 F. (2d) 728, 731 (First Circuit, March 14, 1934), the Court said:

> "It is urged by the government, however, that the deficiency assessment against the corporation of $96,803.87 was paid voluntarily by the corporation, and if so, it cannot be recovered. This was true at common law, but Section 1014 of the Act of 1924 (26 U. S. C. A., Section 156), in force at the time this payment was made, modified the common law rule."

Jenkins v. Smith, Collector, 21 F. Supp. 433, 437. In this case, the Court held that the element of estoppel by voluntary payment was eliminated by the fact that the former condition precedent to a suit to recover taxes illegally collected or payment under protest or duress, had been abolished. Section 3226, R. S., as amended (26 U. S. C. A., Sec. 1672, 1673). The Court said that every tax collection was now necessarily considered to be involuntary.

Weir v. McGrath, 52 F. (2d) 201. This was a suit brought against the collector. There was no formal protest of any kind but the claim was made that the taxes were illegally demanded. The deputy collector told the president of the company that the taxes must be paid or the officers of the company would expose themselves to criminal prosecution. The Court was of the opinion that this was sufficient to constitute coercion and duress. It is sufficient when the party indicates by protest that he is yielding to what he cannot prevent. This constitutes implied duress, but the Court said that the amendment of 1924 did away with the necessity for protest and duress. The Court said that the statute of 1924 was a recognition of the fact that the recovery against the collector is in substance and effect a recovery from the government, and that the statute is an example of liberality and fairness upon the part of the government showing its unwillingness to retain the benefit of that which was wrongful, whether the technicalities formerly required had been complied with or not. This rule was applied in the suit against the collector.

Lucas v. Kentucky Distilleries and Warehouse Co., 70 F.(2d) 883. Here, a corporation owned a distillery plant, but the plant was conducted in the name of its employee, Wilkin. The tax claimed to be illegal was actually paid by the Company, and the Company brought suit to recover the tax. The collector, as a part of his defense, claimed that the distillery was a mere volunteer, and that therefore it could not sue to recover the tax which it had paid. The Court held:

"Wilkin had no interest in the property and to

protect itself from distraint the appellee was compelled to pay the tax and its only remedy was to protest and to sue to recover it back."

The Court said:

"Moreover, Revised Statute 3251 (26 U. S. C. A. Section 249), imposes a joint and several liability for taxes on distilled spirits, upon every proprietor or possessor, and any person in any manner interested in the use of any still, distillery or distilling apparatus, and impresses a lien on any land or buildings wherein such spirits are in existence. To say that the owner of land upon which the statute impresses a lien for taxes may not in discharging the lien question the validity of the tax requires a rather strained interpretation of his status as taxpayer."

In our case, the lien was upon the cotton of Petitioners.

Austin National Bank v. Sheppard, Comptroller, 71 S. W. (2d) 242 (Commissioner of Appeals of Texas, 1934). The Court said:

"A person who pays an illegal tax under duress has a legal claim for its repayment.

* * *

"Duress in the payment of an illegal tax may be either express or implied, and the legal duty to refund is the same in both instances. 26 R. C. L. 457, Section 413. When the statute provides that the tax payer who fails to pay the tax shall forfeit his right to do business in the state and have the Courts closed to him, he is not required to take the risk of having his right to resort to the Courts disputed

and his business injured while the invalidity of the tax is being adjudicated. 26 R. C. L. 458.

* * *

"Under Article 1529, R. C. S., this Company was required to file with the Secretary of State a certified copy of its character. This it did.

* * *

"The fee of $2500.00 paid for filing the amended charter was demanded and paid while the asphalt company's ten-year permit to do business was in full force. It did not legally owe such fee. If the asphalt company had refused to pay such fee, it could not have gotten its charter amendment filed without resorting to the courts, and would have run the risk of having its right to do business in this state and its right to resort to the courts of this state called in question during the litigation. Also during such period it would have run the risk of having its business greatly hampered and injured. Under such a record, we hold that the asphalt company paid this tax or fee under implied duress, and not as a volunteer. We further hold that under the rules of law above announced, the state is legally liable to repay this tax so illegally demanded and collected."

Under some of the authorities which we have cited, if the Santo Tomas Gin Company had, under the facts of this case, brought a suit against the Collector to recover these taxes, because of the unconstitutionality of the Bankhead Act, it is conceivable that the Court might have held that the evidence showed that the tax was paid

by Stahmann Farms, that it was not paid by Santa Tomas Gin Company, that it had suffered no injury, and that therefor it was not entitled to recover the tax.

A similar view was taken by the Supreme Court of Illinois in *Standard Oil Company v. Bollinger*, 180 N. E. 396. In that case, it was held that where the Standard Oil Company had collected the gasoline tax from its customers, and had willingly paid the tax to the Tax Collector, it could not recover because it had not paid the tax out of its own funds. The Court held that the Standard Oil Company had suffered no loss, because of the fact that the funds used by it in paying the tax had been collected by it from others.

The case of *Benzoline Motor Fuel Co. v. Bollinger*, 187 N. E. 657, Supreme Court of Illinois, 1933, deserves consideration. The Benzoline Motor Fuel Company brought suit against Bollinger, Director of Finance of the State of Illinois, to recover a gasoline tax paid by it to the State Treasurer, in the amount of $24,268.90. The law under which the tax had been collected had been previously declared to be unconstitutional in another case brought by another taxpayer. The contention was made that the tax had not been paid by the plaintiff, but by its customers. Plaintiff, however, claimed that it brought the suit not only for its own benefit, but for the benefit of its customers, to whom it had agreed to make a refund if the tax should be collected. It was claimed that the tax had been voluntarily paid, but the tax payer claimed payment under duress. The Court said:

> "It is not necessary that the party paying the tax be in physical danger, or that he be actually placed

in a position that his property is about to be seized, in satisfaction of the tax, or that his back be to the wall, so to speak. Chicago and Eastern Railway Co. v. Miller, 140 N. E. 823. That case clearly held with the well known rule that a person who accepts the benefits of a statute is generally barred thereafter from challenging its validity, provided no question of public policy or public morals is involved; but where it is an involuntary acceptance of the statutory provisions, or where money is paid under the pressure of severe statutory penalties or to avoid disastrous effects to business the payment is involuntary and the money may be recovered. Union Pacific Railway Co. v. Public Service Commission, 248 U. S. 67, 63 Law Ed. 131. Virtual or moral duress is sufficient to prevent a payment made under its influence from being voluntary. Robertson v. Frank Bros. Co., 132 U. S. 17, 33 Law Ed. 236. Where such duress is exerted under circumstances not justified by law it need only be sufficient to influence the apprehensions and conduct of a prudent businessman. If the duress is exerted by one clothed with official authority or who is exercising a public employment, less evidence of compulsion or pressure is required. Justice Holmes, speaking for the Court in A. T. & S. F. Railway Co. v. O'Connor, 223 U. S. 280, 56 Law Ed. 436, said: 'It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the State's Collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter, he can interpose his objections by way of defense; but when, as is common, the state has a more summary remedy such as distress, and the party

indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little slow to recognize the implied duress under which payment is made.' The evidence for the complainant demonstrated that the Director of Finance intended to take, and did take, all necessary steps to collect the tax imposed on motor fuel, regardless of all questions then raised as to the invalidity of the law. The necessary forms were prepared and sent to all distributors in the State by employees in his office. No indication or hint according to the record, was ever given out that the law would not be enforced. We regard as unimportant the argument advanced that the Director of Finance did not make any threats or coerce any one into paying the tax. The statute designated and empowered that official to collect the tax. *The penalties for non-payment of the tax were not formulated as rules and regulations by the Director; they were part of the statute, so that the statute—not the director—was proclaiming the penalties to the motor fuel distributors of the State.* The distributors had every right to indulge in the legal presumption that an officer of the State would live up to his oath of office to perform the duties imposed upon him by law. The evidence disclosed actions on the part of the Director of Finance of such character as to constitute duress well within the rule laid down in the cases above cited." (Italics ours)

The Court said that from the evidence it was apparent that the complainant was acting for the benefit of its customers, as well as for itself; that the facts of the case were such that the Court should hold that the Director of Finance is in control of money that in equity and good conscience he has no right to retain, inasmuch as the suits for the return of the tax money in full to the customers of the complainant without any deductions was straight and broad. The Court said:

> "To contend that this litigation is an endeavor to give to customers indirectly what the law does not give directly is only to say that the interests of the customers are such that this suit cannot prevail, which in this particular instance would mean that the customers would lose. Such a decision would violate equity and good conscience, as by it the State would receive and retain money illegally collected under an unconstitutional law by resting its right on a technicality and not upon the basic principles of justice."

The Court distinguished the case under consideration from the case of *Standard Oil Co. v. Bollinger*, supra. In the *Benzoline Motor Fuel Company* case, the Court pointed out that the Company had collected the tax from its customers with the agreement that it would seek to recover the tax, and in such event would refund it to the customers.

In our case, it is apparent that the Santo Te... Company is making no claim for a refund, that t... for making such claim has expired, and that if ... recovered the tax, it would be in duty bound to ... over to Stahmann Farms. The real taxpayers ... Petitioners in this case, and a grave injustice ... done if they were denied a recovery on the highly ... nical theory urged by Respondent.

We respectfully request that the Judgment of the ... cuit Court of Appeals for the Tenth Circuit be reve... with directions to affirm the Judgment of the Trial C...

Respectfully submitted,

THORNTON HARDIE,
Of El Paso, Texas,
Attorney for Petitio...

W. C. WHATLEY,
Of Las Cruces, New Mexico,

R. NEILL WALSHE,
Of El Paso, Texas,
Of Co...